Issue: Step 4 Formal Performance Improvement Counseling Form with Termination (failure to follow policy); Hearing Date: 08/08/14; Decision Issued: 08/18/14; Agency: UVA Medical Center; AHO: William S. Davidson, Esq.; Case No. 10391; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 09/02/14; EDR Ruling No. 2015-3991 issued 10/16/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/02/14; DHRM Ruling issued 11/18/14; Outcome: AHO's decision affirmed; Attorney's Fee Addendum issued 12/02/14 awarding $6,550.00; Judicial Review: Appealed to Albemarle County Circuit Court on 12/01/14; Final Order issued 04/14/15 [14-1009-00, 14-1009-01]; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Virginia Court of Appeals on 05/12/15; Outcome pending.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10391

Hearing Date: August 8, 2014
Decision Issued: August 18, 2014

PROCEDURAL HISTORY

The Grievant was issued a Formal Performance Improvement Counseling Form ("FPICF") , on April 23, 2014, for:

> [Grievant] is being terminated for multiple unauthorized intentional accesses of a patients' medical record without authorization which is a violation of Medical Center Human Resources Policies No. 707 - Violations of Confidentiality and No. 701 - Employee Standards of Performance and Conduct.
>
> An audit conducted by the Medical Center Corporate Compliance and Privacy Officer revealed theat [Grievant] had accessed her ex-husband's Protected Health Information (PHI) on 12/9/13, 12/24/13, 1/28/14 and 2/25/14 without proper authorization. [1]

Pursuant to this FPICF, the Grievant was terminated on April 23, 2014. [2] The Grievant timely filed a grievance to challenge the Agency's actions on May 19, 2014. [3] On June 9, 2014, this appeal was assigned to a Hearing Officer. Due to the parties' respective calendars, the hearing was held at the Agency's location on August 8, 2014.

APPEARANCES

Counsel for Agency
Counsel for Grievant
Agency Party Representative
Witnesses
Grievant

[1] Agency Exhibit 1, Tab 2, Pages 1-2
[2] Agency Exhibit 1, Tab 2, Pages 1-2
[3] Agency Exhibit 1, Tab 1, Page 1

ISSUE

1. Did the Grievant violate Agency Policy Nos. 707 and 701?

2. Did the Grievant receive disparate treatment from others involves in this matter and/or was mitigation considered by the Agency?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

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[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing fifteen tabs and that notebook, with the exception of Tab 7, was accepted in its entirety as Agency Exhibit 1. There was an objection to Tab 7, and that Tab was excluded.

The Grievant provided me with a notebook containing twenty tabs and that notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

Pursuant to discussions with me, counsel for both the Agency and the Grievant stipulated that the Grievant accessed the PHI for her ex-husband ("Patient") on December 9, 2013; December 24, 2013; January 28, 2014; and February 25, 2014. The access was performed at Patient's request and in his presence. Pursuant to the uncontradicted testimony of the Grievant and Patient, I find that each of them, at the time of access, was an employee of the Agency and that each of them had the authority to access their own personal PHI.

It was also stipulated by counsel that the Patient had appointed the Grievant as his agent in both his General Durable Power of Attorney dated April 9, 2012 [8] and his Advance Medical Directive dated April 9, 2012. [9]

Medical Center Human Resources Policy No. 707(D)(1), provides in part as follows:

> ... A Single Access is Accessing a single patient's record within a single twenty-four hour period.
>
> A Multiple Access is:
>
> - Accessing the records of two or more patients, regardless of the time frame within which the Access occurs; or
>
> - Accessing the same Patient's record on more than one occasion within two or more twenty-four hour periods (as measured from the time of the first access) [10]

Medical Center Human Resources Policy No. 707(D)(2), provides as follows:

> Authorized Access or Disclosure - Access to or Disclosure of Confidential Information that is necessary to support treatment, payment or business operations, **or as is otherwise permitted by law and Medical Center**

[8] Grievant Exhibit 1, Tab 7, Pages 1-6
[9] Grievant Exhibit 1, Tab 10, Pages 1-2

[10] Agency Exhibit 1, Tab 12, Page 1

policy. [11] (Emphasis added)

Medical Center Human Resources Policy No. 707(E)(1), provides as follows:

> Each employee must report all actual or suspected Violations promptly (and in any event within twenty-four hours) to his/her manager/designee of the relevant area. [12]

Medical Center Human Resources Policy No. 707(E)(4), provides as follows:

> Any employee(s) responsible for a Violation shall be subject to corrective action based on the level of the Violation. [13]

Medical Center Human Resources Policy No. 707(E)(6)(b), provides in part as follows:

> Intentional Access to Confidential Information without Authorization
>
> This occurs when an employee intentionally Accesses Confidential Information without authorization...
>
> ... Corrective Measures:
>
> A Level 2 Violation involving PHI shall be considered serious misconduct and shall, in most instances, result in performance warning (see Medical Center Human Resources Policy No. 701 "Employee Standards of Performance") with a three (3) day suspension without pay for the first Level 2 Violation involving PHI and **disciplinary action up to and including termination for multiple Level 2 Violations**, and for those Level 2 Violations where access was obtained under false pretenses... [14]

Medical Center Human Resources Policy No. 707(E)(6)(c), provides as follows:

> Level 3: Intentional Disclosure of Confidential Information
>
> This occurs when an employee intentionally discloses Confidential Information without authorization...
>
> ...Corrective Measures:

[11] Agency Exhibit 1, Tab 12, Page 2
[12] Agency Exhibit 1, Tab 12, Page 2
[13] Agency Exhibit 1, Tab 12, Page 3
[14] Agency Exhibit 1, Tab 12, Pages 3-4

> Disciplinary action for Level 3 Violations involving PHI in most cases shall result in immediate termination of employment. [15] (Emphasis added)

Medical Center Human Resources Policy No. 701(C), provides in part as follows:

> ...Performance issues and misconduct are generally addressed through a process of progressive performance improvement counseling as outlined in this policy...[16]

Medical Center Human Resources Policy No. 701(C)(2), provides in part as follows:

> Serious Misconduct refers to acts or omissions having a significant impact on patient care or business operations...
>
> Examples of Serious Misconduct include, but are not limited to:
>
> ...Intentionally accessing PHI without authorization...[17]

On May 1, 2014, the Agency issued a Risk Assessment and Determination of Breach Notification, wherein it determined that there was a low probability that PHI was compromised and was, thus, not a breach. [18]

There was agreement between the Agency and the Grievant that she had been trained numerous times on the policies that are appropriate to this matter before me. Indeed, in the most current training, **the Agency produced a handout which set forth: counseling; suspension without pay; performance warning; loss of job; and reporting to applicable licensing board, as possible consequences if an employee accessed PHI without a work-related need**. [19] The Agency clearly contemplates and instructs that there is a progression in the level of punishment.

I heard persuasive testimony from both Agency and Grievant witnesses that the Grievant's immediate supervisor was present during at least some of the four stipulated accesses by the Grievant to the Patient's PHI. Based on the demeanor and character of the witness testimony, I find that this supervisor approved such access and, in violation of Policy 707(E)(1), did not report such access to her supervisor.

I heard testimony from Agency witnesses that, because the Grievant's supervisor was supporting the Grievant's position that assisting the Patient in exercising his right to access his records was not a violation and, because the Agency felt that the Grievant's supervisor had violated confidentiality in talking to the Grievant about this matter as it was working its way through the administrative process, the Grievant's supervisor was removed from the process.

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[15] Agency Exhibit 1, Tab 12, Page 4
[16] Agency Exhibit 1, Tab 13, Page 1
[17] Agency Exhibit 1, Tab 13, Pages 2-3
[18] Agency Exhibit 1, Tab 4, Page 3
[19] Agency Exhibit 1, Tab 9, Page 7

However, I heard testimony that the Grievant's supervisor only received a Formal Letter of Counseling in this matter, even though the Agency was fully aware that the Grievant's supervisor was aware of the Grievant's actions and tacitly condoned them and did not report them. [20]

On April 9, 2012, the Patient executed a Virginia Advance Medical Directive. [21] That document served to appoint the Grievant as the Patient's agent. It further set forth, at Paragraph B, the following:

> To request, receive and review any information (whether verbal, written, printed or electronically recorded) regarding my current mental or physical health, including but not limited to medical, hospital and other records; and to consent to the disclosure of such information for medical or insurance purposes. [22]

This document was in place prior to the accesses that are before me in this grievance. The Patient, as an employee of the Agency, had the authority to access his own record. He testified before me and indicated that, because of his ongoing cancer, his ability to enter his access code into the computer system to access his records; his ability to view those records once accessed; and his ability to understand the records, was seriously compromised. He asked the Grievant to assist him to exercise his own right. While it would seem that is a right he has without any written document, it is clearly a right that he could convey to the Grievant and did convey to the Grievant pursuant to the Advance Medical Directive. The Grievant's testimony and the Patient's testimony emphatically set forth that she was assisting him in exercising his right to access his records.

In addition to the Advance Medical Directive, on April 9, 2012, the Patient also appointed the Grievant as agent under his General Durable Power of Attorney. [23] This gave the Grievant even greater authority to act on his behalf than the Advance Medical Directive.

The Agency clearly established that, regardless of its own policies, where there are multiple accesses for any reason whatsoever, termination is the only possible remedy. Witnesses for the Agency and counsel for the Agency used the word "consistency" literally tens of times in justifying the concept that, where there is a multiple act of access, there must be termination. Indeed, when I questioned an Agency witness and asked the hypothetical question, "If an employee did not have the use of their hands, could they request another employee to simply enter the appropriate code and then immediately leave the area so as to not see any PHI, would this be an unauthorized access?" The witness replied, "Yes, it would be an unauthorized access."

The Agency introduced an Exhibit whose sole purpose was to establish the consistency with which it terminated all employees where there were determined to be multiple accesses to

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[20] Grievant Exhibit 1, Tab 20, Page 1
[21] Grievant Exhibit 1, Tab 10, Pages 1-2
[22] Grievant Exhibit 1, Tab 10, Page 2
[23] Grievant Exhibit 1, Tab 7, Pages 1-6

PHI, regardless of the reason. [24] The Agency saw no irony in that this Exhibit quite vividly demonstrated that the Agency never mitigated in these matters, regardless of the facts. It also clearly illustrated that the Agency read its policy and training manuals to provide for only a single punishment: Termination.

The Agency, through its witnesses, readily concedes that there was no disclosure of PHI, other than to the person to whom it belonged. The Agency, through its own witnesses, indicates that the misconduct here is "serious misconduct" and not "gross misconduct" as set forth in Policy 701(C)(2)(b). [25] The Agency concedes that the Patient had legitimate access to his own records and had granted power to the Grievant to have access to those records. The Agency simply has established a knee-jerk reaction policy that, if there is a multiple-access, then there is termination. All of this for "consistency." I am reminded of the Ralph Waldo Emerson quote, "Foolish consistency is the hobgoblin of little minds." The Agency wishes to adopt a policy that simply means no one in management must think through the actual facts of the matter before them. The Agency's policies and training materials speak to progressive punishment. The Agency's training manuals speak to progressive punishment. The Agency chooses to read both its policy and its training manuals to say, if there are multiple accesses you shall be terminated. The Agency has the skill-set in place to re-write its policies and training manuals, it simply has not done so here.

Based on the testimony presented to me and the demeanor and character of the witnesses, the documents appointing the Grievant as agent for the Patient; the Patient's ability (as an employee of the Agency, to access his own records); and the Patient's testimony that he asked the Grievant to assist him in accessing his own records, I find that there has been no unauthorized access of the Patient's PHI in this matter.

Should the Agency ask EDR or DHRM to review this Decision, and it is found that my finding regarding no improper access to the Patient's PHI is incorrect, I would then find that there has been disparate treatment in this matter. The Grievant's supervisor knew of and approved the Grievant's actions and the testimony before me was that this supervisor received a Performance Counseling Letter. Generally, management is held to a higher standard than those that they supervise. The Agency introduced no evidence whatsoever as to why the Grievant should be treated more harshly than her supervisor. Indeed, the Agency's testimony in this matter is that mitigation is simply never considered in multiple access events; termination is the only finding possible. Accordingly, I find that there was no mitigation (see discussion under mitigation); and there was also disparate treatment; and the Grievant should receive no punishment greater than her supervisor.

Finally, as an example of the strangeness of the Agency's policies regarding access to PHI, I would point out that the Agency readily conceded before me that ten or fifteen or fifty accesses in a 24-hour period would not result in termination. However, a 30-second access followed by a second 30-second access 24 hours and one second later, would be considered a multiple access event and, according to their current policies, would result in automatic termination. One can only wonder.

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[24] Agency Exhibit 1, Tab 5, Page 1

[25] Agency Exhibit 1, Tab 13, Page 3

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. Because of my finding that there was no improper access of PHI in this matter, I do not find mitigation necessary. However, as previously stated, should EDR or DHRM disagree with my finding regarding access, then I specifically find that this matter warrants mitigation in order to preclude disparate treatment between the Grievant and her supervisor.

On February 24, 2011, in Ruling 2011-2866, the Director of EDR ruled in part as follows:

> ...The Rules provide that in disciplinary grievances, if the hearing officer finds that:
>
> (i) the employee engaged in the behavior described in the Written Notice,
>
> (ii) the behavior constituted misconduct, and
>
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness...

Of course, I have found that the Grievant's behavior did not constitute misconduct and that the Agency's discipline was not consistent with its own policy. But if EDR or DHRM determine that I am incorrect in that ruling, then I must find the discipline exceeds the limits of reasonableness.

The Agency has specifically disregarded its own policy and training manuals. An agency certainly can have a policy that if an employee commits an act, then termination is certain to follow. However, it cannot have a policy that allows for and trains for progressive discipline

when it knows of no circumstances under which it would use such discipline. This is a sham and a fraud perpetuated on its employers.

The Patient had an absolute right to view his PHI. He asked the Grievant to assist him. He named the Grievant as Agent under both his Advance Medical Directive and his General Durable Power of Attorney. He was present when his PHI was accessed. His PHI was shared only with him and his agent. It begs credulity to think this is the fact pattern contemplated when the policy in question was written. Termination under these facts exceeds the limits of reasonableness.

In addition, regarding disparate treatment, on August 1, 2011, in Ruling 2011-3025, the Director of EDR ruled in part as follows:

> ...The grievant has asserted disparate treatment because she alleges other employees called in sick during a state holiday, but that "these extreme measures were not taken" against them. However, beyond a bare allegation of "discrimination," the grievant has presented no claim or evidence that she was treated differently based on a protected status. Therefore, the claims in the grievance are insufficient to raise a question of disparate treatment and thus do not qualify for [a] hearing...

The clear and unequivocable evidence before me, both from Agency witnesses and Grievant witnesses is that the Grievant was treated differently than her supervisor. One was terminated and the other received a letter. Clearly disparate treatment took place.

DECISION

For reasons stated herein, I find that the Agency has not bourne its burden of proof in this matter. I order that the Agency reinstate the Grievant to the same position or an equivalent position. I further order that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that she have a restoration of full benefits and seniority.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received by** the reviewer within 15 calendar days of the date of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[26] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[27]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

_____
William S. Davidson
Hearing Officer

[26] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[27] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
FEE ADDENDUM OF HEARING OFFICER
In Re: Case No: 10391

Issued: December 2, 2014

PROCEDURAL HISTORY

On August 8, 2014, a hearing was held in this matter and on August 18, 2014, I issued my Decision. On August 29, 2014, Grievant's counsel filed a Fee Petition and certified that, on that same date, a true copy of said Fee Petition was mailed to Sandra M. Pai, Esquire, the Agency's counsel. Subsequently, on September 2, 2014, the Agency filed an Appeal of the Hearing Officer's Decision with EDR and DHRM and, on September 12, 2014, Counsel for the Grievant filed a response to the Agency's Appeal. On October 8, 2014, the Agency's counsel filed a response to Grievant's counsel's Fee Petition. On October 16, 2014, EDR issued an Administrative Review Ruling which was made moot by the November 18, 2014, Administrative Review Ruling issued by DHRM, which upheld my finding that the Grievant had not violated Agency policy. On November 27, 2014, Grievant's counsel filed a Supplemental Fee Petition.

GOVERNING LAW

Attorney's fees are dealt with at VI(E) of Rules for Conducting Grievance Hearings and at Section 7.2(e) of the Grievance Procedure Manual. Attorney's fees are only available where the Grievant has been represented by an attorney and has substantially prevailed on the merits of a Grievance challenging his discharge. For such an employee to substantially prevail, the Hearing Officer's Decision must contain an Order that the Agency reinstate the employee to his or her former (or an equivalent) position. My Decision ordered that the Grievant be reinstated to the same position or an equivalent position.

Section 7.2(e) of the Grievance Procedure Manual requires that counsel for the Grievant ensure that the Hearing Officer receives within fifteen (15) calendar days of the issuance of the original Decision, counsel's Petition for Reasonable Attorney's Fees. In this matter, that was done and as provided, the Petition included an Affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the Rules for Conducting Grievance Hearings. Further, a copy of this Fee Petition was provided to the Agency, as is required by the Rules.

OPINION

Counsel for the Agency objected to 8.7 hours contained in the first Fee Petition filed with me. The Grievant had one attorney who represented her from the inception of this matter until

the day prior to the prehearing conference, or a total of 8.7 hours. The Grievant's current attorney included those hours in the first Fee Petition. Counsel for the Agency is correct in her assertion that neither the *Rules for Conducting Grievance Hearing* nor the *Grievance Procedure Manual* address the issue of a Grievant having more than one attorney. However, I find nothing therein that prohibits this. While I do not know why the Grievant changed her attorney in this matter, the rule clearly would not hold against the Grievant if the reason was for death, senility, impairment or disbarment. I can find no guidance that prohibits a Grievant from voluntarily choosing to change attorneys during the course of a grievance. Accordingly, I find that a Grievant may change attorneys during representation and, in this matter, time for both attorneys is reasonable.

In her first Fee Petition, counsel requested attorney's fees of $5,135.20. This was arrived at by charging $131.00 per hour for 39.2 hours. In her Supplemental Fee Petition, counsel requested attorney's fees of $1,414.80. This was arrived at by charging $131.00 per hour for 10.8 hours. I have carefully considered the two Fee Petitions and accordingly, will allow counsel for the Grievant to collect attorney's fees of $131.00 per hour for 50.0 hours, for a total award of $6,550.00.

APPEAL RIGHTS

Within ten (10) calendar days of the issuance of the Fee Addendum, either party may petition EDR for a Decision solely addressing whether the Fee Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once EDR issues a ruling on the propriety of the Fee Addendum, and if ordered by EDR, the Hearing Officer has issued a revised Fee Addendum, the original Decision becomes final and may be appealed to the Circuit Court in accordance with Section 7.3(a) of the Grievance Procedure Manual.

_____

William S. Davidson
Hearing Officer